

RA BRIEF
FLORIDA ASSUMPTION OF STATE 404 PROGRAM

Date Updated: *Original* **Date Original Prepared:** 8/8/2018 **Priority:** 3

EPA Goal Supported: Cooperative Federalism, Rule of Law and Process

Issue: 404 Assumption by the State of Florida

Location: State of Florida

Context:

1. Involved Parties: EPA, Corps, USFWS, NMFS, FDEP.
2. Interested parties: Governor Rick Scott, the White House, other states, media, and various stakeholders (mining, developers, Tribes, environmental NGOs).
3. Florida is working on an official request to assume administration of a CWA section 404 program. Before making their request, Florida must pass a rule that will set up the required program elements. The Florida rulemaking timeline and possible legal challenges to that rulemaking, as well as finalizing the Corps/FDEP MOA which identifies which waters the state will assume and which waters the Corps will retain, are currently driving the timeline.

4.

Ex. 5 Deliberative Process (DP)

Critical Messages:

1. Florida may submit a package requesting state assumption of CWA 404 program administration in mid-November or later. Legal challenges to the currently proposed state rule could delay Florida's timeline. Upon receipt of a complete request package, EPA's 120-day statutory review must include a public hearing, a 45-day public comment period, and consideration of comments received from the public, USACE, USFWS, and NMFS. Assisting FDEP with the development of a 404 assumption program remains a high priority for Region 4. EPA staff are actively communicating with Florida staff to help ensure the State's process for submission and the EPA's review process will be conducted as efficiently as possible.
2. To address certain issues, including permit duration, Florida is going back to the initial rulemaking step of issuing a Notice of Rule Development. The rulemaking process takes at least three months, making the currently anticipated endpoint mid-October. However, any legal challenge along the way could add 60 days or more.

3.

Ex. 5 Deliberative Process (DP)

4. The Corps of Engineers' 7/30/18 memo instructed Corps districts to follow the FACA majority opinion as far as using RHA Section 10 lists for identifying Corps-retained waters. However, the memo left it to Corps districts and states to resolve where to draw the administrative boundary for adjacent wetlands. The description of assumable waters is a key element of the Corps/FDEP MOA (currently in development), a required component of a complete assumption request package.

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Ex. 5 Deliberative Process (DP)

6. Florida is developing implementation procedures regarding their process for delineating wetlands, which will provide clarity regarding the relationship between waters of the state and waters of the United States. FDEP is making good progress on this effort and is considering informal input from the Corps and the EPA.

Considerations:

Ex. 5 Deliberative Process (DP)

Assumable Waters

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Ex. 5 Deliberative Process (DP)

8. As part of the program submittal, FDEP will have to identify the number of FTE's available and the level of funding they will provide to support the program. This expansion will have an impact on that analysis.

CWA five-year permit limit

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Location Visual: Water Management Districts of Florida



Expanded Facts:

1. A complete assumption package must include:
 - Letter from the Governor requesting the program
 - A complete program description (e.g., regulatory cross-walk, wetland delineation methodology)
 - Attorney General Statement
 - Memorandum of Agreement between the State and EPA
 - Memorandum of Agreement between the State and the Corps
 - Copies of all applicable State statutes and regulations

Timelines

2. Florida projects finalizing rulemaking mid-October if there are no legal challenges, putting their official assumption request to EPA mid-November.
3. Legal challenges to Florida's rule are generally viewed as likely, which could add 60 days for a single challenge to several months for multiple challenges.
4. EPA has 120 days to review a state's assumption request. ****This includes a requirement for at least a 45-day public comment period after Federal Register notification, and at least one public hearing.****

EPA receives state's request to assume program

EPA determines program submission is complete & so notifies state

EPA provides copies of State's submission to Corps, FWS, & NMFS (HQ & regional)

- Corps, FWS, & NMFS comments due within 90 days

EPA initiates consultation with tribes per Executive Order (timeline not specified)

Notices of complete application: Federal Register, newspapers, interested parties

- FR Notice triggers 45-day public comment period
- Public hearing(s) 30+ days after FR Notice publication
- ****Florida has requested in writing that EPA hold multiple public hearings.****

EPA reviews & considers comments received.

- Prepares summary of significant comments, response to public comments
- Responds individually to comments from Corps, FWS, & NMFS

If EPA approves, notify state & publish approval in Federal Register

Ex. 5 Deliberative Process (DP)

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